No. 220.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

ARABIAN AMERICAN OIL COMPANY,

Petitioner,

HOWARD FARMER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court (page 14, Appendix A of Petition), granting, after trial, petitioner's motion for a directed verdict and judgment dismissing the complaint, is reported at 176 F. Supp. 45. The unanimous opinion of the Court of Appeals for the Second Circuit, reversing the judgment of the District Court and remanding the case for a new trial (page 1, Appendix "A" of Petition), is reported at 277 F. 2d 46.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

We are unable to accept the questions formulated by petitioner as correctly representing the issues of this case.

Petitioner's question "(b)" contains, contrary to the finding of the Court of Appeals[1] and Petitioner's tacit admission in that Court,[2] as a key assumption, the premise that "* * * there is no express or implied authority to * * * hire for the term alleged" (p. 2 of Petition).

Similarly, petitioner's question "(c)" makes the basic and incorrect assumptions (i) that the employment of the respondent is not pursuant to the April 13th oral agreement,[3] as claimed by respondent, but pursuant to a form letter dated May 26th involving workmen's compensation

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[1] In its opinion, the Court of Appeals stated, *inter alia:*

> "There can be little doubt that Dr. Allen had apparent, if not actual authority to offer employment to the plaintiff. * * *" (1st sentence, second complete paragraph, page 11 Appendix "A" of Petition.)
>
> "* * * In view of these circumstances we conclude that there was sufficient evidence of Dr. Allen's apparent authority to justify submission of the issue to the jury." (Last sentence, 1st paragraph, page 12, Appendix "A" of Petition.)

[2] In its brief below, petitioner stated, *inter alia:*

> "On this record the most that appellant (respondent here) can contend is that Dr. Allen had apparent authority to employ him for the duration of appellee's operation of its oil wells in Saudi Arabia" (pp. 21, 22, Appellee's Brief in the Court of Appeals).

[3] Respondent testified without contradiction that he was employed under an oral agreement made on April 13th, confirmed, as Petitioner admits (page 4, 2nd full paragraph, Appellee's [Petitioner's] brief in the Court of Appeals) by Petitioner's letter in writing dated April 13th and Respondent's post card in reply as requested by Petitioner in such letter.

rights,[4] and (ii) that such May 26th letter constituted an integration of the parties' agreement.[5]

The questions presented are:

1. Is an oral contract of employment "for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia," within the New York statute of frauds, N. Y. Pers. Prop. Law §31(1), and therefore void and unenforceable because not in writing?

2. (a) Is there any proof in this record from which a jury may infer that Dr. Allen, Petitioner's Associate Medical Director, was authorized to offer Respondent employment for the term alleged?

(b) Is there any proof in this record from which it may be found that Petitioner ratified Respondent's employment upon the terms alleged?

(c) On this record may it be found that Petitioner is estopped from denying Dr. Allen's authority to make the contract in suit?

3. (a) Whether a casual memorandum containing a reference to only some of the terms of a previously concluded oral employment agreement constitutes an integra-

[4] This document signed in the course of routine processing after Respondent had entered upon and was engaged in the performance of his duties, was found by the Court of Appeals to be "* * * lacking in any normal terms of employment. * * *" (9th line, 1st paragraph, page 7, Appendix "A" of Petition).

[5] The Court of Appeals found "* * * there is nothing to show that the parties intended an integration of their negotiations in the printed form of May 26, 1955; in fact the contrary is strongly indicated. * * * We think it therefore beyond dispute that there was no integration of the agreement so as to prevent resort to parol evidence of its terms" (last paragraph page 6, and last sentence, 1st paragraph, page 7, Appendix "A" of Petition).

tion of the same, absent an intention by the parties that it should do so?

(b) Assuming *arguendo* that such casual memorandum is an integration of the prior parol agreement to the extent of the terms therein embodied, does such partial integration, under the New York parol evidence rule, preclude evidence of the omitted terms which do not vary or contradict any of the written terms?

(c) Whether the decision in *Leifer* v. *Scheinman*, 179 App. Div. 665—which holds that under the parol evidence rule parol testimony is admissible to supply evidence of an oral agreement for the duration of an employment where the written employment agreement contains no reference to duration—is in conflict with *Miller* v. *Burlington Mills Ribbon Corp.*, 304 N. Y. 600—which deals with the sufficiency, under the statute of frauds, of a memorandum relied upon to take the contract there involved out of the statute, and which holds that to satisfy the statute the memorandum must be complete and no essential term may be supplied by parol?

Statutes Involved.

The Fifth Amendment to the Constitution, which Petitioner invokes, and New York Personal Property Law §31(1) are set forth at page 1, Appendix "B" of the Petition.

Statement of the Case.[6]

Plaintiff, an opthalmologist, seeks damages for wrongful discharge, in breach of an oral employment contract.

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[6] Respondent will be referred to as "Plaintiff" and petitioner as "Defendant".

Plaintiff answered defendant's advertisement offering employment to qualified board certified doctor candidates under 40[7] years at its Middle East oil installations.

In response, one A. B. Brautovich, defendant's "recruiting representative"[8] communicated with plaintiff by telephone, arranged for plaintiff to complete and return to defendant its employment application forms furnished by Brautovich, and thereafter arranged that plaintiff should come to New York from Austin, Texas, at defendant's expense, for a personal interview with Dr. Allen, defendant's Associate Medical Director,[9] head of defendant's medical department in this country,[10] in charge of recruiting,[11] interviewing and hiring American personnel for defendant's medical services.[12]

After an interview in defendant's New York offices lasting the better part of February 7, 1955, Dr. Allen sent a written report of the interview[13] as well as plaintiff's employment application and qualification record to Dr. Page, defendant's Medical Director in Arabia, who was the "sole arbiter" of who is hired and fired in defendant's medical department in Arabia,[14] who, after an exchange of correspondence, notified Dr. Allen that plaintiff was "acceptable" and authorized his employment.

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[7] Dr. Allen, defendant's Associate Medical Director, testified at trial that the age limit was imposed in order ". . . to find men who were of a younger age so they could stay with us a longer period, sir". (Vol. I, p. 46a of certified record.)

[8] Vol. I, p. 13a of certified record.

[9] Vol. I, p. 15a of certified record.

[10] Vol. I, pp. 33a and 39a of certified record.

[11] Vol. I, p. 15a of certified record.

[12] Vol. I, pp. 14a and 33a of certified record.

[13] Vol. I, p. 32a of certified record.

[14] Vol. I, p. 32a of certified record.

Following this interview, Dr. Allen was in touch with plaintiff on several occasions in connection with pre-employment processing. Upon completion of these preliminaries Dr. Allen extended a definite offer of employment to plaintiff via telephone on April 13, 1955.[15] Plaintiff

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[15] Plaintiff's testimony concerning this April 13th conversation follows:

"; • • • and about approximately the 13th of April I got another telephone call from Dr. Allen in New York, and he told me that my papers were complete, and that he was ready to offer me the job as ophthalomologist in charge of the eye department at their health center in Dhahran" (a. 19).

"• • • "

"• • • He said the salary would be $16,000 a year plus a living expense of about $4,000; that he didn't know the exact amount of that because it was paid in Saudi reals, the currency of that country; and then I asked him two questions, one of which I had gotten from the brochures that they had sent to me about employment there, and under that I read something about the employment perhaps being for the convenience of the company • • • "

"• • • "

"• • • (continuing) And he told me that these brochures that I told him about were out of date and that the Company was reprinting them; that they did not apply, and that I had no concern about that; that I would have a job there for as long as Arabian Oil Company operated or had oil wells in Arabia.

And then, again, I brought up one more question, because recently or just prior to that there had been the expropriation of the British oil wells in an adjacent country. I asked him about that, and he said that was something they couldn't foresee, and that he couldn't give me any assurance about that; and also I asked him then about the duration of the employment. I told him that I did not want to go over there for a very short time, a few months or anything like that, and I would not be interested in going for less than a period of five years, and he says, 'Well, we cannot measure this in years due to the circumstances of being expropriated or something of that kind, but you will have that job so long as we operate oil wells, and—in Arabia' and I said 'Very well. With that assurance I will accept the position' and he said, 'You are hired' " (Vol. I, pp. 19a and 20a of certified record).

accepted this offer and did not subsequently discuss the terms of employment with any of defendant's representatives. The formal offer of employment was confirmed by letter from defendant's Personnel Department dated April 13, 1955.[16] It is conceded that plaintiff signed and returned the post card of confirmation as therein requested,[17] and that defendant received same.

Pursuant to these instructions plaintiff reported to defendant's New York office on May 26, the day before his scheduled departure, to complete processing. Here he was instructed by various employees of defendant to complete a number of forms. These included a group insurance form, a hospital medical plan form, and a salary allotment form, as well as other miscellaneous papers. Among these

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[16] The body of this letter—addressed to Dr. Farmer at 409 W. 15th Street, Austin, Texas, and signed by A. T. Wisner, Assistant Manager, for G. A. Wood, Manager, Personnel Department—is as follows:

> "This will confirm our offer of employment.
>
> "You are scheduled to depart for Saudi Arabia by international air flight departing New York on May 27, 1955. Please arrange domestic transportation to permit you to report at 9:00 a.m., May 26th, at our office on the 7th floor, 505 Park Avenue, New York City, for processing.
>
> "You may present this letter to the domestic airline for clearance of the 66 pounds international baggage allowance.
>
> "It is imperative that you have your inoculation certificate with you.
>
> "Please confirm your acceptance of this formal offer of employment and advise us arrival time in New York. The enclosed post card may be used for this purpose.
>
> "Upon receipt of your confirmation, we will forward $21.00 New York expense allowance and $123.10 transportation allowance from Austin, Texas to New York. Should you desire, we shall also obtain reservations for you at the Park Sheraton Hotel. Should your arrival subsequently be delayed, please advise the hotel of such delay direct."

[17] The card contained the statements:

> "Employment offer accepted.
>
> "Will report as scheduled for processing and departure. I will have my innoculation [sic] record with me."

was a workmen's compensation agreement which defendant claims as the "employment agreement."[18]

Plaintiff duly arrived in Saudi Arabia on May 30, 1955, and performed his duties at defendant's hospital until his discharge on February 5, 1956. As a consequence plaintiff instituted this action.

At trial, defendant renewed[19] its contention that the employment was at will pursuant to the "employment agreement" of May 26. Defendant also renewed[20] its contention that the oral agreement was void under the New

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[18] This document, on defendant's letterhead, entitled "Employment in Foreign Service" is addressed to Dr. Farmer, Austin, Texas, is signed in the name of defendant by J. H. McDonald, and is marked "Accepted: Howard Farmer, Employee's Signature, Date: May 26, 1955."

The body of the document—which is a printed form with insertions as shown by the underlined material—is as follows:

> "This will confirm our offer of employment in the Company's Foreign Service to be effective on May 22, 1955.
>
> "Your annual rate of basic earnings will be U. S. $16,000.00.
>
> "Your initial job classification will be opthalmologist.
>
> "Benefits as provided in the New York Workmen's Compensation Law shall constitute the Company's entire liability and your exclusive remedy against the Company in the event of your disability or death whether arising out of or in the course of your employment or resulting from the use of transportation facilities operated by or for the Company.
>
> "Will you please confirm your acceptance of this offer by signing and returning two copies of this letter to us."

[19] On June 25, 1957, defendant's motion for summary judgment on the same ground was denied by Judge Noonan.

[20] On February 18, 1958, defendant's motion for summary judgment on the same ground was denied by Judge Weinfeld who said *inter alia:*

> "The plaintiff's alleged agreement that he was employed by the defendant for the duration of the defendant's operation of its oil wells in the Kingdom of Saudi Arabia appears to be capable of performance within one year and hence does not come under the ban of the Statute of Frauds, *Steiner* v. *Fenster*, 51 N. Y. S. 2d 814; *High* v. *Pritzker*, 58 N. Y. S. 2d

York Statute of Frauds. Defendant also urged[21] that there was no proof that Dr. Allen had authority[22] to employ plaintiff on the terms alleged and that plaintiff was discharged for cause. Plaintiff testified no justifiable cause for discharge existed and that he was discharged because he refused to suppress and falsify medical findings which had undesirable financial consequences to the defendant.

706, *aff'd* 59 N. Y. S. 2d 57; *Duncan* v. *Clarke*, 308 N. Y. 282, Restatement Contracts R. 198. • • •"

Defendants application for reargument was likewise denied by Judge Weinfeld who said:

> "The attached letter is treated as a motion to reargue and denied on the ground of failure to comply with Southern District Court Rule 9(h). Moreover the Court did not overlook the case of *Zupan* v. *Blumberg*, 2 N. Y. 2d 547. The Court there held that the contract in question was not 'one which might be performed within a year, but rather one which could only be terminated within that period by a breach of one party or the other to it.' at p. 552. As noted in the original opinion, under the allegation of the complaint of the operation of defendant's oil wells in Saudi Arabia ceased within a year (which is, a possible event) the contract between plaintiff and defendant could have been performed, not terminated, within the statutory period. The fact that more than a year has already elapsed or that 'performance within a year is highly improbable or not expected by the parties does not bring a contract within the statute' Restatement, Contracts §198 Comment G. See, also, 2 Corbin, Contracts §446."

[21] Although defendant was twice granted leave to serve an amended answer—first to plead the Statute of Frauds and then, upon the call of the trial assignment calendar, to plead justification for plaintiff's discharge—the defense of lack of authority was never pleaded and was first raised after plaintiff had opened to the jury (Vol. I, page 16a of certified record).

[22] In a letter dated January 12, 1956, to the United States Department of State, relating to plaintiff's status, defendant stated, *inter alia:*

> "Dr. Farmer is a regular employee in the foreign service of this Company. • • • The Company • • • regards regular employment as career and permanent, subject to the usual conditions of lay-off, resignation and termination common to industry. Our personnel policies reflect this understanding and seek to foster longevity of service."

After trial the jury was unable to reach agreement and was discharged. The Court thereupon entered judgment for defendant in accordance with defendant's motion for a directed verdict. Fed. R. Civ. P. 50(b). In his decision, D. C. S. D. N. Y., 176 F. Supp. 45, Judge Palmieri relied upon three independent grounds for the result he reached: Parol evidence was inadmissible to vary the terms of the May 26 agreement; the alleged oral agreement was void under the Statute of Frauds; and Dr. Allen lacked authority[23] to offer employment for the term alleged.

On plaintiff's appeal to the United States Court of Appeals for the Second Circuit, that Court unanimously reversed the judgment and remanded the case for trial. 277 F. 2d 46. (Page 1, Appendix "A" of Petition.)

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[23] The trial court granted judgment of dismissal on this ground notwithstanding its ruling at trial and a charge to the jury that there was proof of ratification and grounds for estoppel. Thus, in response to defendant's motion for dismissal, the trial court ruled:

> "The Court: I deny that motion because the company acted upon it and it is perfectly possible that in ratifying, at least in part, the action of Dr. Allen, an inference might be reached by the jury that Dr. Allen did without his authority, without specific authority, but under apparent authority, bind the company and that the company did everything that was necessary to ratify his act. So I think it is clearly a question for the jury to decide whether or not, and I am leaving aside for the moment the question of the statute of frauds and the parol evidence problem, which have been staring me in the face from the outset; but leaving aside that problem, I will decline, absolutely, to dismiss on the ground of lack of authority" (Vol. I, p. 61a of certified record).

In his charge to the jury, the trial judge said *inter alia*:

> "I instruct you that an agent may bind his principal within the limits of the authority with which he has apparently been clothed in respect of the subject matter of his agency, and the authority of an agent is enlarged by implication when the principal permits the agent to do acts not expressly authorized, and if through inattention or otherwise the principal suffers his agent to act beyond his authority without objection, he is bound to those who are not aware of any want of authority to the same extent as if the requisite power had been directly conferred." (Vol. I, p. 62a of certified record).

Reasons For Not Granting the Writ.

The petition for certiorari should be denied because:

FIRST. Petitioner has failed to show the existence of an exceptional reason for the review by this Court of the non-final judgment here involved. Petitioner's sole reason—that at trial the trial court is bound by the Court of Appeals' decision—is equally applicable to all intermediate and non-final judgments, and if valid, would require review by this Court of all such judgments;

SECOND. Entirely apart from the invalidity of Petitioner's contentions, this case is clearly not appropriate for certiorari. The questions presented are on alleged errors of law of private concern only to the litigants involved;

THIRD. Although it is claimed a conflict of decision exists, caused, it is alleged, by the refusal of the Court of Appeals for the Second Circuit to follow the law of New York, there is, in fact, no conflict of decision. It appears that Petitioner is aggrieved by the refusal of the Court of Appeals to adopt Petitioner's interpretation of the law, and seeks certiorari in order to obtain another hearing;

FINALLY. The decision of the Court of Appeals is in full accord with the applicable New York law and is correct.

Argument In Support of Reasons For Not Granting Writ.

1. No Exceptional Reason Is Shown For The Review Of This Non-Final Judgment.

This court has declared it will not issue a writ of certiorari to review a non-final judgment in the absence of

some exceptional reason. *Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U. S. 372, 384.

Petitioner grounds its application on the Fifth Amendment to the Constitution of the United States, claiming it is being deprived of due process of law. Obviously, since, in the event of an adverse judgment petitioner will have the right of appeal, including the right to apply to this court for certiorari on the grounds now urged, petitioner is not deprived of due process of law.

As already noted, petitioner's argument—that unless certiorari is granted, the trial court will be bound by the decision of the Court of Appeals—is equally applicable to all non-final judgments and intermediate orders, and hardly serves as an exceptional reason for granting certiorari in this case.

2. The Questions Presented Are On Alleged Errors Of Law Of Private Concern Only.

The private dispute between these litigants can be of concern only to themselves and their counsel. The decision below turns upon its own peculiar facts and it is highly unlikely that these unusual facts will recur in relation to the propositions of law here involved.

This is not a case which presents questions whose resolution will have immediate importance far beyond the particular facts and parties involved or tremendously important principles upon which are based the plans, hopes and aspirations of a great many people throughout the country.[24]

No question of public concern appears in the pending petition.

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[24] Address of Chief Justice Vinson before American Bar Association, September 7, 1949, St. Louis Daily Record (Sept. 8, 1949, p. 1).

3. No Conflict of Decision Exists.

The petition fails to disclose any conflict of decision. Petitioner failed to persuade two District Judges, three Court of Appeals Judges and the Chief Judge of the Court of Appeals[25] to adopt its view of the law. Nevertheless petitioner continues to urge its differing view of the law as the basis for its claimed conflict of decision.

It is apparent that what petitioner really seeks is another hearing. This Court has declared that the jurisdiction of this court to review cases by way of certiorari was not conferred merely to give the defeated party in the Court of Appeals another hearing. *Magnum Co* v. *Coty*, 262 U. S. 159, 163.

4. The Decision Of The Court Of Appeals Is In Accord With New York Law And Is Correct.

It is regrettable that in its zeal to accomplish its aim, Petitioner finds it necessary to accuse a Judge of the Court of Appeals of giving "direct assistance to the circumvention of binding state precedents . . ." (p. 11, 2nd complete paragraph of Petition).

This is all the more regrettable when it is considered that except for the trial judge in this case, Petitioner has been uniformly unsuccessful in persuading any judge of the correctness of its interpretation of the law.

However, the integrity and reputation of this distinguished court and illustrious judge are established beyond the reach of slurs or the need for defense.

Petitioner's presentation contains several inaccuracies.

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[25] Following the decision of the Court of Appeals, petitioner applied without success to the Chief Judge of the Court of Appeals, to convene that court *en banc* on essentially the same grounds now urged here.

At page 11 of its petition, Petitioner refers to ". . . Judge Clark, now writing for the majority . . . ." (in this case). This is in furtherance of the preceding discussion which makes it appear as though the result in this case is attributable to one judge. The fact is that the decision of the Court of Appeals was unanimous and Judge Clark spoke for the entire court.

In the third complete paragraph on page 11, Petitioner has quoted out of context one phrase from the opinion below in such a manner as to suggest that the decision below was grounded on the court's belief that the statute of frauds is an anachronism and for that reason refused to enforce the same.

As a reading of the opinion will readily disclose, that is not the fact. The Court had already concluded that the cases upon which Petitioner relied as bringing this case within the statute were distinguishable and inapplicable and that in keeping with established New York law the contract in the case at bar is not within the statute. The quoted phrase was not at all necessary to the decision and merely gave expression to a view widely held and approved.

These gross inaccuracies are inexcusable and alone would justify denial of the petition (Rule 23[4]).

Respondent submits that the decision below reflects the correct application of familiar principles of law, as we shall demonstrate.

I.

The New York Statute of Frauds.

In New York, the rule has been long established that, if an oral agreement may, consistently with its terms be entirely performed within one year, it does not fall within the condemnation of the statute, even though it be neither

probable nor expected that it will be performed within that time. *Trustees of First Baptist Church* v. *Brooklyn Fire Ins. Co.*, 19 N. Y. 305, 307 (1859); *Kent* v. *Kent*, 62 N. Y. 560, 564 (1875); *Warren C. & M. Co.* v. *Holbrook*, 118 N. Y. 586, 593 (1890); *Blake* v. *Voigt*, 134 N. Y. 69, 73 (1892); *Rochester Folding Box Co.* v. *Browne*, 55 App Div. 444, aff'd 179 N. Y. 542 (1904).

It is likewise the settled rule that a contract at will or one performable for an indefinite period which may end before the expiration of a year, is equally capable of performance within a year, and the courts have consistently so held. *Storer* v. *Ripley*, 282 App. Div. 950 (2nd Dept. 1953); *Rathbone* v. *Mion*, 282 App. Div. 792 (3rd Dept. 1953); *Claybourn Corp'n* v. *Charles Schweindler Press Inc.*, 250 App. Div. 50 (1st Dept. 1937); *Sherrill* v. *Bull*, 129 Misc. 623, aff'd 222 App. Div. 792 (4th Dept. 1927); *Roberts* v. *Summit Park Co.*, 72 Hun 458 (5th Dept. 1893).

Petitioner insists, however, that notwithstanding the settled law, the contract is within the ban of the statute by reason of certain decisions dealing with commission cases of which *Cohen* v. *Bartgis Bros. Company*, 264 App. Div. 260, aff'd 289 N. Y. 846 (1943) may be said to be the parent, and *Zupan* v. *Blumberg*, 2 N. Y. 2d 547 (1957), relied upon by Petitioner, one of its progeny.

This line of cases does not change the long established law in any particular. See 16 Fordham L. Rev. 95 (1947).

In those cases it was held, as the cases themselves make clear, that the contract as made by the parties could not be *performed* within one year because no agreement had been made that the occurrence of a possible event within one year would bring the contract to its natural and fully performed end. The possibility that the contract could be defeated by a supervening contingency, would not, it was held, be sufficient to take those cases out of the statute.

The distinction between the contracts in those cases and the contract in the case at bar is that of a contract which must, *by its terms*, take more than a year to perform but which may be defeated by a supervening contingency and one whose stated object can be fully performed within that time.

The New York courts have uniformly interpreted the law accordingly. *Krawitz* v. *Gross*, Sup., 156 N. Y. S. 2d 576; *Platt* v. *Whitelawn Dairies, Inc.*, 3 Misc. 2d 19, 150 N. Y. S. 2d 391, affirmed 2 A. D. 2d 683, 153 N. Y. S. 2d 583; *Nat Nal Service Stations, Inc.* v. *Wolf*, 304 N. Y. 332, 107 N. E. 2d 473. See also *Gruber* v. *S-M News Co.*, 2 Cir., 208 F. 2d 401.

The decision below is fully in accord with the New York law as interpreted by the New York State Courts.

II.

Dr. Allen's Authority to Contract.

Petitioner's argument under this subdivision is different from its question "(b)" (p. 2 of Petition) covering this subject.

The question as propounded by Petitioner assumes the absence of ". . . express or implied authority . . ." (p. 2 of Petition) to make the contract in suit.

Petitioner's discussion on the subject (pp. 12-16 of Petition) argues that under New York law no power exists to make lifetime contracts. No effort is made to sustain the contention that there is no proof of express or implied authority to make the contract in suit. We believe the evidence overwhelmingly establishes the contrary.

In support of its contention that New York law prohibits employment agreements for life, Petitioner cites *Carney* v.

New York Life Ins. Co., 162 N. Y. 453 (1900), and *Heaman v. E. N. Rowell Co.*, 261 N. Y. 229 (1933).

Both of these cases, it will be noted, involved companies whose affairs were administered by Trustees with limited powers. In *Carney, supra*, the alleged oral contract was made 26 years prior to plaintiff's discharge. It was there held there was no dispute as to the facts ". . . consequently the question arising with reference to the meaning of the by-law (which conferred the alleged power to make the contract) and, as to whether the contract is reasonable, is for the court and not for the jury." (p. 455, 162 N. Y.).

In *Heaman, supra*, the court expressly declared: "That a contract for employment for life if authorized by the corporation and based on an adequate consideration, will ordinarily be sustained admits of no dispute." (p. 231, 261 N. Y.).

Thus, by the very case cited by Petitioner, it is established, contrary to its contention, that there is no policy in New York forbidding lifetime employment contracts. In a proper case such contracts will be upheld. *Davidson* v. *Library Bureau*, 234 App. Div. 47. mod. 259 N. Y. 654 (1932).

Moreover, under settled New York law, Petitioner is deemed to have ratified respondent's contract of employment. *Baltimore & O. R. Co.* v. *Foar*, 84 F. 2d 67 (7 Cir. 1936); *Anderson* v. *Wood-Dolson*, 212 App. Div. 483, 487, 1st Dept. 1925); *Palmer et al.* v. *New York Herald Co.*, 228 App. Div. 176 (1st Dept. 1930); *Latiner* v. *Wonderland Amusement Co.*, 161 App. Div. 554 (1st Dept. 1914); Mechem, *Law of Agency*, 2d Edition, §272.

Likewise under settled New York law, as correctly stated by the trial court in its charge Petitioner is estopped from denying Dr. Allen's authority to make the contract in suit.

Benesch v. *John Hancock Mut. Life Ins. Co.*, 11 N. Y. S. 714, 16 Daly 394, 34 N. Y. St. Rep. 16 (Com. Pl. N. Y. 1890),

affirming *Benesch* v. *John Hancock Mut. Life Ins. Co.*, 10 N. Y. Supp. 956; *Mook* v. *Parke, et al.*, 9 Misc. Rep. 90 (Gen. Term, 1894); *Small* v. *Housman*, 208 N. Y. 115, 123 (1913); *Globe & Rutgers F. Ins. Co.* v. *Warner Sugar R. Co.*, 187 App. Div. 492, 495 (1st Dept., 1919); *Krstovic* v. *Van Buren*, 200 App. Div. 278, 280 (3rd Dept., 1922); *Ring* v. *Long Island Real Estate Exchange*, 93 App. Div. 442, 447 (2d Dept., 1904), aff'd 184 N. Y. 553.

The decision below correctly applied New York law in holding that the question of Dr. Allen's authority should have been left for jury determination.

III.

The New York Parol Evidence Rule.

Petitioner's half hearted effort to sustain its argument under this heading requires no protracted answer.

The trial court was led into error by Petitioner's contention that *Leifer* v. *Scheinman*, 179 App. Div. 665, 167 N. Y. Supp. 105 (1st Dept. 1917) dealing with the precise question here involved, and dispositive of the same, "must be deemed to have been overruled by *Miller* v. *Burlington Mills Ribbon Corp.*" (footnote[8] to opinion of District Court, page 21 Appendix A to Petition).

Miller, supra, a case decided in the context of the statute of frauds, had no bearing upon *Leifer, supra*, a case dealing with the parol evidence rule. See *Ellis* v. *Klaff*, 96 C. A. 2d 471, 216 p. 2d 15 (Cal. 1950).

The painstaking and comprehensive opinion of the Court of Appeals is in all respects in conformity with the applicable New York law.

Conclusion.

The decision below is correct and involves neither a conflict of decisions nor a question of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: New York City, August 3, 1960.

Respectfully submitted,

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